Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ERIC V. LUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I Whether the Convening Authority and the Military Judge Violated the Vicinage Provisions of the Sixth Amendment to the United States Constitution in Allowing the Court-Martial to Proceed in the Northern District of Florida When the Alleged Activity Occurred in the Southern District of Mississippi.

II Whether the Petitioner's Sixth Amendment Right to Counsel Was Violated When He Received Ineffective Assistance of Counsel from Inexperienced Attorneys of the Judge Advocate General Corps.

III Whether the Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution When He Refused to Allow the Court-martial to Call Witnessers Pursuant to M.R.E. 614.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 23

APPENDIX

Order of the United States Court of Appeals for the Armed Forces Denying Review 1a

Decision of the United States Navy and Marine Corps Court of Criminal Appeals 2a

Text of Pertinent Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations 21a

TABLE OF AUTHORITIES

Page

CASES

ARIZONA V. FULMINANTE, 499 U.S. 279, 309 (1991) 9

BILLINGS V. TRUESDELL, 321 U.S. 542 (1944) 21

BURNS V. WILSON, 346 U.S. 137 (1953) 6

CHALMETTE PETROLEUM CORP. V. CHALMETTE OIL DISTRIBUTING CO., 143 F.2D 826 (5TH CIR. 1944) 22

CHENOWETH V. VAN ARSDALL, 46 C.M.R. 183, 22 USCMA 183 (1973) 4, 6

COMPLAINT OF NAUTILUS MOTOR TANKER CO., LTD., 85 F.3D 105, 111 -112 21

COURTNEY V. WILLIAMS, 1 M.J. 267, 270 (C.M.A. 1976) 6

DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579, 585-87 (1993) 21

ESTRELLA-ORTEGA V. UNITED STATES, 423 F.2D 509 (8TH IR, 1970) 22

EX PARTE QUIRIN, 317 U.S. 1, 39 (1942) 6

FIELDING V. UNITED STATES, 164 F.2D 1022 (6TH CIR. 1947) 22

HYDE V. SHINE, 199 U.S. 62, 78 (1905) 8

IN RE CHESSON, 897 F.2D 156, 158 (5TH CIR. 1990) 5

JOHNSTON V. UNITED STATES, 351 U.S. 215 (1956) 8

MEIER V. STATE, 337 N.W.2D 204, 206-07 (IOWA 1983) 16

MILLER V. ARKANSAS, 352 U.S. 187 (1956) 21

NEALY V. CABANA, 764 F.2D 1173, 1177 (5TH CIR.1985) 10

ORNELAS V. UNITED STATES, 517 U.S. 690 (1996) 5

PARK V. CITY OF CHICAGO, 297 F.3D 606, 611 (7TH CIR.2002) 21

PLATT V. MINNESOTA MINING & MANUFACTURING CO., 376 U.S. 240 (1964) 7

PUBLIC UTILITIES COMMISSION V. UNITED STATES, 355 U.S. 534 21

REED ENTERPRISES V. CLARK, 278 F.SUPP. 372 (D. D.C. 1967). AFF'D 88 S.CT .1196 (1968) 8

ROMPILLA V. BEARD, 545 U.S. 374 (2005) 9

ROSARIO V. KUHLMAN, 839 F.2D 918, 924 (2D CIR.1988) 22

SMITH V. UNITED STATES,., 331 F.2D 265, 273 22

STATE V. HAWTHORNE, 431 N.W.2D 630 (NEB. 1988) 16

STRICKLAND V. WASHINGTON, 466 U.S. 668, 690-91(1984) 10

TAYLOR V. ILLINOIS, 484 U.S. 400, 409 (1988) 22

UNITED STATES V. BRANDT, 196 F.2D 653, 655. (2D CIR. 1952) 22

UNITED STATES V. CORES, 356 U.S. 405, 407 (1958) 6

UNITED STATES v. CRUZ-JIMINEZ, 977 F.2D 95, 100 (3D CIR.1992) 22

UNITED STATES v. CRYAR 232 F.3D 1318, 1320 (10TH CIR. 2000) 4

UNITED STATES v. DAVIS, 47 M.J. 484, 486 (C.A.A.F. 1998) 20

UNITED STATES v. DORAN, 7 M.J. 1015, 1017 (N.M.C.M.R 1979) 6

UNITED STATES v. DUNCAN, 919 F.2D 981 (5TH CIR. 1990) 6

UNITED STATES v. EZELL, 6 M.J. 307, 313 (C.M.A. 1979) 6

UNITED STATES v. KARNES, 531 F.2D 214 (4TH CIR. 1976) 22

UNITED STATES v. LIANG, 224 F.3D 1057, 1059 (9TH CIR. 2000) 4

UNITED STATES v. LIDDY, 509 F.2D 428 (D.C. CIR. 1974) CERT DENIED, 420 U.S. 911 22

UNITED STATES v. LUCAS, 2005 WL 2375180 (N.M.CT.CRIM.APP. 2005) 4

UNITED STATES v. MILLER, 111 F.3D 747, 754 (10TH CIR. 1997) 8

UNITED STATES v. MORGAN, 393 F.3D 192, 195 (D.C. CIR. 2004) 4

UNITED STATES v. NIXON, 15 M.J. 1028 (A.C.M.R. 1983) 15

UNITED STATES v. NOVAK, 443 F.3D 150, 161 (2ND CIR. 2006) 4

UNITED STATES v. PARKER, 7 U.S.C.M.A. 182, 21 C.M.R. 308 (1956) 19

UNITED STATES v. PEREZ, 280 F.3D 318, 327 (3RD CIR. 2002) 4

UNITED STATES v. RIVERA, 23 M.J. 89, 95 (C.M.A. 1986) 15

UNITED STATES v. ROBAINA, 39 F.3D 85[illegible]362 (8TH CIR. 1994) 22

UNITED STATES v. ROBINSON, 275 F.3D 371, 378 (4TH CIR. 2001) 4

UNITED STATES v. SCHEFFER, 523 U.S. 303, (1998) 19, 21

UNITED STATES v. SCOTT, 24 MJ 186 (1987) 9

UNITED STATES v. STRAIN, 396 F.3D 689, 692 (5TH CIR. 2005) 4

UNITED STATES v. STRATTON, 649 F.2D 1066, 1077 (5TH CIR. 1981) 9

UNITED STATES v. TURKALI, 6 U.S.C.M.A. 340, 20 C.M.R. 56 (1955) 19

UNITED STATES v. VALENZUELA-BERNAL, 458 U.S. 858, 868-69 (1982) 22

UNITED STATES v. WADE, 15 M.J. 993, 997 (N.M.C.M.R. 1983) 21

UNITED STATES v. WASHINGTON, 57 M.J. 394, 402

(C.A.A.F. 2002) 16

UNITED STATES V. WOOD 364 F.3D 704, 710 (6TH CIR. 2004) 4

WIGGINS V. SMITH, 123 S.CT 2527 (2003) 9

WIGGINS V. SMITH, 539 U.S. 510, 521 (2003) 10

WILLIAMS V. TAYLOR, 529 U.S. 362 , 396 (2000) 9

YBARRA, 629 S.W.2D 943, 946 (TEX.CRIM.APP.1982) 16

STATUTES

10 U.S.C. § 836 1

28 U.S.C. § 1254 1

OTHER AUTHORITIES

CHRISTOPHER W. BEHAN, DON'T TUG ON SUPERMAN'S CAPE: IN DEFENSE OF CONVENING AUTHORITY SELECTION AND APPOINTMENT OF COURT-MARTIAL PANEL MEMBERS, MILITARY LAW REVIEW, 176 MIL. L. REV. 190 21

LEDERER,1 THE MILITARY RULES OF EVIDENCE: ORIGINS AND JUDICIAL IMPLEMENTATION, MILITARY LAW REVIEW, 130 MIL. L. REV. 5 (FALL 1990) 20

SEPTEMBER 1, 1980. EXEC. ORDER NO. 12,198, 45 20

OPINIONS BELOW

The Opinion of the Court of Appeals for the Armed Forces denying the petition for review is unreported. The decision of the Navy and Marine Corps Court of Criminal Appeals denying relief on the matters raised in this petition is unreported.

BASIS FOR JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on Certiorari. The final judgment of the United States Court of Appeals for the Armed Forces was entered on May 26, 2006. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

RELEVANT PROVISIONS INVOLVED

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

U. S. CONST. AMND V
U. S. CONST. AMND VI
Article 36 U.C.M.J. (10 U.S.C. § 836)
Military Rule of Evidence 614
Military Rule of Evidence 707
Military Rule of Evidence 1102
Military Rule of Evidence 910

Military Rule of Evidence 913
Military Rule of Evidence 919

Pertinent text of citations are set out in the appendix.

STATEMENT

Eric Lucas was a senior petty officer with a solid professional and personal reputation. His flawless career was cut short when he was charged with a number of felonies arising out of a shooting accident. The incident was indicative of bad judgment and alcohol abuse but was not the criminal acts alleged by the government. The lack of competent counsel coupled with the Military Judge's flagrant violation of the Manual for Courts-Martial, resulted in an unjust conviction.

The incident that gave rise to appellant's trial occurred in Pascagoula Mississippi, within the Southern District of Mississippi. This case arose when the appellant and two shipmates went to his house after their ship returned to home port. The three sailors consumed alcohol and played dice. During the course of the gathering, the appellant called his girlfriend on his cell phone. He became angry and shot his cell phone with a Davis .380 semi-automatic pistol. Neither Young or Carpenter were in the same room as appellant when he shot the phone. Carpenter was actually outside. There was no danger to either person.

Appellant later returned to the living room. According to Young, appellant was still angry and told SN Carpenter he would kill him. Shortly thereafter the gun discharged, hitting SN Young in the leg. A second

shot also hit Young in the leg.

Shortly thereafter, Ms. Jaime Chong, a friend of appellant pulled up to the house. She saw SN Young and SN Carpenter leave the house. Although they claimed that Appellant fired another shot at them, Ms. Chong did not hear a shot being fired.

Appellant was tried before a General Court-Martial at Naval Air Station, Pensacola, Florida on 12-14 February 2002. He plead guilty to the wrongful discharge of a firearm and assault on SN Young. He plead not guilty to the remainder of the charges but was convicted of assault on SN Carpenter, communicating a threat to Carpenter and wrongfully confining the two sailors.

BM1 Lucas was punished with confinement for a period of 1 year, total forfeitures, reduction in pay grade to E-1, and a bad conduct discharge. The convening authority approved the findings and the sentence without clemency.

A post-trial polygraph revealed that appellant's story was truthful. Additionally, post-trial investigation revealed deficiencies with the safety of the Davis .380. Due to an inadequate investigation by defense counsel, this evidence was not discovered prior to trial.

The court below set aside and dismissed the conviction for Charge I specification 2 as improvident and reassessed the sentence based on post-trial delay, approving only so much of the sentence extending to confinement for eight months and reduction to pay grade E-1.

REASONS FOR GRANTING THE PETITION

I The Convening Authority and the Military Judge Violated the Vicinage Provisions of the Sixth Amendment to the United States Constitution in Allowing the Court-Martial to Proceed in the Northern District of Florida When the Alleged Activity Occurred in the Southern District of Mississippi.

The decision of the courts below conflicts with the decisions of this Court and all United States Court of Appeals that have considered the matter. The Court of Appeals for the Armed Forces did not grant oral argument on this issue or allow supplemental briefing. Presumably it relied upon *Chenoweth v. Van Arsdall*, 46 C.M.R. 183, 22 USCMA 183 (1973). The Navy Marine Corps Court of Appeals merely ignored this issue. *United States v. Lucas*, 2005 WL 2375180 (N.M.Ct.Crim.App. 2005). The doctrine articulated in *Chenoweth* stands alone for the proposition that a military court-martial can be held outside the State and district of the alleged crime. *See, United States v. Novak*, 443 F.3d 150, 161 (2nd Cir. 2006); *United States v. Perez*, 280 F.3d 318, 327 (3rd Cir. 2002); *United States v. Robinson*, 275 F.3d 371, 378 (4th Cir. 2001); *United States v. Strain*, 396 F.3d 689, 692 (5th Cir. 2005); *United States v. Wood* 364 F.3d 704, 710 (6th Cir. 2004); *United States v. Liang*, 224 F.3d 1057, 1059 (9th Cir. 2000); *United States v. Cryar* 232 F.3d 1318, 1320 (10th Cir. 2000); *United States v. Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).

Appellant's trial was onboard the Naval Air Station in Pensacola, Florida within the Northern District of Florida for events that were alleged to have

occurred in Pascagoula, Mississippi. A military courthouse at the nearby SeaBee base in Gulfport, Mississippi was available within the Southern District of Mississippi. Another military courthouse was available at Keesler Air Force Base in Biloxi, Mississippi. Additionally federal courthouses are located within the Southern District of Mississippi including the federal courthouses at Gulfport, Biloxi, Meridian and Jackson. Since this is an issue of constitutional law, the standard of review is *de novo*. *Ornelas v. United States*, 517 U.S. 690 (1996)

Since colonial times, Americans have resisted government attempts to pack a defendant off to an inconvenient location to hold a trial. In the Declaration of Independence, the Founding Fathers included this complaint against King George as one of the reasons for the severance of ties with the motherland. *In re Chesson*, 897 F.2d 156, 158 (5th Cir. 1990). By Article III of the Constitution, the federal government was required to try a person in the State where the crime was committed. *Id.* This requirement was strengthened by the adoption of the Sixth Amendment which provides:

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of *the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added).

It is well settled that a general court-martial is a criminal proceeding. *United States v. Doran*, 7 M.J. 1015, 1017 (N.M.C.M.R 19[illegible]. Consequently, the Sixth Amendment attaches. It is also well settled that the Sixth Amendment requires that criminal trials be held in the district or state in which the alleged crime occurs. *United States v. Duncan*, 919 F.2d 981 (5th Cir. 1990); *United States v. Cores*, 356 U.S. 405, 407 (1958). The Navy-Marine Corps Court of Criminal Appeals erroneously relied upon *Ex Parte Quirin*, 317 U.S. 1, 39 (1942) which is inapplicable, to find that Article III and the Sixth Amendment did not attach. *Quirin* applies only to military tribunals and not to courts-martial.

Thirty years ago, the Court of Military Appeals addressed this issue in the military context. *Chenoweth v. Van Arsdall, supra. Chenoweth* is not consistent with the precedents of this Court which has held that absent military necessity the protections of the Bill of Rights apply to military members. *Burns v. Wilson*, 346 U.S. 137 (1953). Military courts subsequent to *Chenoweth* have addressed the issue of the Bill of Rights application to the members of the military service and have held that the Bill of Rights applies to persons in the military. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). When the rights of such persons must be conditioned to meet certain overriding demands of discipline and duty, the burden of showing that military conditions require a different rule than that prevailing in the civilian community is on the party arguing for different rule. *See, also, United States v. Ezell*, 6 M.J. 307, 313 (C.M.A. 1979). *Id.* Thus *Chenoweth* must be limited to its facts.

Chenoweth involved sabotage onboard the aircraft carrier *Ranger*. At the time of the court-martial,

the ship was deployed to a combat zone off the coast of Vietnam. The government requested a change of venue to the Philippines to be near the situs of the crime and the witnesses. Here the appellant wishes to accomplish the same result as the government in *Chenoweth*. The situs of the alleged crimes was in Mississippi. The vast majority of the witnesses and all of the physical evidence were also located there. Holding the court-martial in Mississippi would have assisted the defense. Holding the trial in nearby Biloxi or Gulfport would have opened the possibility of a tour of the crime scene. Given the conflicting testimony, such a tour would have been helpful to the trier of fact.

In *Chenoweth*, the actual situs of the crime was the *Ranger*, not the Naval Station San Francisco. The fact that the *Ranger* moved across the Pacific Ocean was irrelevant as to its status of a crime scene. Accordingly, moving the trial to the Philippines near the present location of the *Ranger* was consistent with the petitioner's Sixth Amendment rights. Although the court rejected the constitutional justification for the move, it embraced the underlying reasons for it.

As discussed above, the military courts must follow the dictates of the Supreme Court. The *Chenoweth* holding is in opposition to Supreme Court precedent and cannot be applied to the instant case. The Supreme Court has explained that trials must be held near the scene of the crime to "safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240 (1964).

In the instant case, the trial was many miles away

from the situs of the alleged offense. The government had no operational reason for holding the trial in Florida. Witnesses and evidence were in Mississippi. There were both military and federal court rooms within the State and District and in close proximity to the scene of the alleged crime.

Early in this century, Mr. Justice Brown emphasized why trials need to be held close to the situs of the purported offense. In his opinion in *Hyde v. Shine*, 199 U.S. 62, 78 (1905), Mr. Justice Brown noted:

> To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.

Justice Brown's analysis not only makes good sense, it supports the principle of fundamental fairness. This is the cornerstone of our standards of due process and it represents the law of the land. Justice Reed, in his opinion in *Johnston v. United States*, 351 U.S. 215 (1956), noted that the situs of a trial must be fixed at the vicinage of the crime and that any variation for the convenience of the prosecution (or the petitioner) cannot be justified. *Id.* at 220-21. *Reed Enterprises v. Clark*, 278 F.Supp. 372 (D. D.C. 1967). *aff'd* 88 S.Ct .1196 (1968).

The right to venue in the vicinage of the alleged offense is a fundamental right in a criminal proceeding. *United States v. Miller*, 111 F.3d 747, 754 (10th Cir. 1997); *United States v. Stratton*, 649 F.2d 1066, 1077 (5th Cir.

1981). Accordingly, actual prejudice need not be shown. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Thus the convictions for the charge and specification must be set aside. This Court should align the military system with the rest of the federal criminal system and require the armed forces to implement the vicinage provisions of the Sixth Amendment.

II The Petitioner's Sixth Amendment Right to Counsel Was Violated When He Received Ineffective Assistance of Counsel from Inexperienced Attorneys of the Judge Advocate General Corps

The issue in this case is ripe for review pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States. The Court of Appeals for the Armed Forces has decided the issue of ineffective assistance of counsel contrary to the holdings of the Supreme Court of the United States. The court below failed to set aside the conviction when faced with a failure by the defense team to properly investigate and prepare for trial. This is in opposition to this Court's holdings.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court reaffirmed its earlier holding in *Wiggins v. Smith*, 123 S.Ct 2527 (2003). The *Rompilla* court specifically found that defense counsel had a duty to conduct a proper investigation and to prepare for trial. In the instant case that did not happen.

Pretrial investigation is essential to the effective assistance of counsel. *United States v. Scott*, 24 MJ 186 (1987); *Williams v. Taylor*, 529 U.S. 362 , 396 (2000). Defense counsel must engage in a reasonable amount of

pretrial investigation and "at a minimum ... interview potential witnesses and ... make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir.1985). This the defense counsel did not do.

Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Thus the articulation of specific errors can overcome the presumption of competence on the part of defense counsel. Counsel cannot be judged competent if there is no apparent tactical reason or no basis to support the tactical choice. Accordingly, the Court must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland*, 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time,"*id.*, at 689, 104 S.Ct. 2052. A review of the defense counsel's decisions confirm that they were not familiar with the law and the facts and there is no logical tactical reason for the defense counsel's actions.

There was voluminous information available for presentation on the Davis .380 and its defective safety

characteristics. The defense counsel failed to do a reasonable investigation and obtain a qualified expert witness who could address not just automatic weapons generally but the peculiarities of this type of weapon. If the members heard from a qualified expert that this type of weapon had defective safety features that allow it to be fired unconsciously, the results might well have been different. The trial defense counsel failed to conduct the investigation into the defective safety devices on the Davis .380 weapon and to address those specific failings with their expert witness. As noted in oral argument in the court below, the expert hypothesized based on the safety being off. He did not address the potential for safety device failure that would have negated any possibility of culpable negligence being imputed to the accused.

The defense further failed to properly prepare their character witnesses regarding the "Key West" incident. In this incident, the Trial Counsel used "have you heard" type questions of character witnesses to imply that the appellant had a violent nature. In reality the Key West incident was completely over blown. Appellant and been attacked and his attacker later filed a complaint against him. The defense counsel should have appraised the eyewitnesses of his story so that they could adequately present the facts when questioned. Proper witness interviews would have negated the effectiveness of any "have you heard" questions. While the information was provided several days before the trial, the defense did nothing to familiarize themselves with the facts of this case.

Additionally, the defense counsel was deficient for not seeking a polygraph test. Civilian polygraphers

experienced with the military are available in Gulfport Mississippi, the base of the detailed defense counsel. Additionally, the Navy Criminal Investigative Service maintains a qualified and competent polygrapher in their Pensacola, FL office. While the polygraph is not currently admissible at trial under Military Rule of Evidence (M.R.E.) 707, it is admissible at an Art. 32. Additionally, results of polygraph tests can be presented to the convening authority at the pre-trial and post-trial stages. Finally, the polygraph could have been used to confront the complaining witnesses in pre-trial interviews or in a deposition. Given the strong non-deceptive results of the post trial polygraph, it was clear error to not have scheduled one prior to the Art. 32. Additionally, the defense team could have requested an exculpatory NCIS polygraph pursuant to SECNAVINST 5520.4B. Had the defense counsel done so, this case might never have gone to trial.

A fair review of the record also revealed a violation of R.C.M. 919(b). The Trial Counsel raised significant new matter in their rebuttal closing. The comment to R.C.M. 919 indicates that when the government raises new material during their rebuttal, the defense counsel should be allowed to reply in rebuttal. This did not occur. The defense counsel erred in not ensuring that the members were not left with unrebutted new information.

Here prejudice was obvious. The initial Trial Counsel closing was less than four pages, consisting mostly of a recitation of the elements of the offense and a prediction concerning the Judge's instructions. The rebuttal was more than twice as long as their argument. The defense counsel should have raised the R.C.M. 919

issue. Because they failed to do so, the Trial Counsel was allowed to raise and argue several salient points that were left unrebutted. This included a constant reiteration that the appellant was intoxicated. The Trial Counsel presented his argument in a manner that did not reflect well on the appellant. He accused the defense of trying to raise a voluntary intoxication defense. Notably this was not discussed in the defense closing. The Trial Counsel also raised an incident that occurred in Key West Florida in rebuttal although not raised by the defense or mentioned in the government closing. This attack on the defense's good miliary character could not be rebutted since it was improperly raised in the government rebuttal. The government then marginalized the defense gun expert and medical expert. Again, since this was raised for the first time in rebuttal, the defense did not have an opportunity to object. The Trial Counsel was also successful in arguing that defense witnesses had a motive to fabricate. Because the issue was raised in rebuttal the defense did not have an opportunity to respond. Nor was the defense given an opportunity to respond to the appellant's actions with the gun or the quality of his housecleaning, specifically why the shell cartridge was thrown out the door and the dice left on the floor. The Trial Counsel referred to the motives of various witnesses to fabricate. These arguments were raised for the first time in rebuttal. The defense was not able to answer them.

There could be no valid tactical advantage for failure to object under R.C.M. 919. If granted an additional argument, the defense counsel could have rebutted the items raised by the government for the first time in rebuttal.

The defense counsel failed to raise the defense of accident or request the Military Judge to provide an instruction on this defense. While the Military Judge has a *sua sponte* duty to give instructions when the evidence fairly raises a defense, the defense counsel, as appellant's advocate, also has a responsibility to ensure that defenses are raised and that the Judge instructs the members on the defense.

The actions of trial defense counsel in allowing and even coercing the accused to plead guilty is further strong evidence that he received ineffective assistance of counsel. To aggravate the situation, the defense counsel chose to disclose the guilty pleas to the members. Arguably that was a defense strategy but to avoid being ineffective assistance there must be some reasonableness to the tactic. Here there was none. The members were presented with a person who had already been convicted of a federal crime. The hardest decision they had to make - whether to convict appellant, had been made for them.

Again, the petitioner has demonstrated that the actions of defense counsel were deficient under the *Strickland* standard. Certainly the allegations are true and that they fall below the standard one would expect in a criminal defense. There was no reasonable logic to support the disclosure of guilty pleas, even if they were provident, to the members. The accused should appear before the members with the presumption of innocence and not wearing the mantle of a convicted felon.

Both the Army and Air Force Courts have considered this practice and found that it negatively impacts the presumption of innocence. *United States v.*

Rivera, 23 M.J. 89, 96 (C.M.A. 1986). In *United States v. Nixon*, 15 M.J. 1028 (A.C.M.R. 1983), the Army court held that:

> we believe that the practice of informing court members of the existence of a charged offense, and of a guilty plea and a finding of guilty thereon prior to presentation of evidence on another charge to which an accused has pleaded not guilty is an anachronism. We urge military judges to discontinue the practice in courts-martial. Whereas formerly court members were required to vote on a finding of a charge to which an accused had entered a plea of guilty, this is no longer true. No useful purpose is served by the continuation of such practice which merely provides a fertile area for assertion of error on appeal. The better course for a trial judge faced with pleas of both guilty and not guilty would be to delay informing the members of the guilty plea and finding until the sentencing portion when such knowledge is necessary to perform the sentencing function.

Id at 1030-31. Unlike the instant case, in *Nixon*, the pleas were to specifications unrelated to the contested offense. Accordingly the *Nixon* court found no prejudice. In the instant case, however, the guilty pleas were to specifications that grew out of the same acts. Also, the current version of the Military Judge's Benchbook does not contain the mixed pleas instruction that existed at the time of *Nixon*.

The discussion to R.C.M. 910(g) notes that "[i]f the accused has pleaded guilty to some offenses but not

to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered." *See also*, R.C.M. 913(a). The only relevant exception to this policy would be if the accused requests such an instruction on the record. *See* R.C.M. 913 *discussion*. Notably, there is no express authorization from the accused on the record. Trial defense counsel's tactic was illegal and prejudicial. This represents another example of defense counsel not being familiar with the Manual for Courts-Martial.

The trial defense counsel's error implicates the presumption of innocence. The advance notification to members of guilty pleas in a mixed plea case adversely affects that presumption. The presumption of innocence is a critical part of our tradition of justice and deeply imbedded in our culture as well as our systems of justice. *United States v. Washington*, 57 M.J. 394, 402 (C.A.A.F. 2002)(Baker, J., concurring). Thus prejudice is obvious.

The trial defense counsel should learn the law before they try to defend an accused at a court-martial. Unfortunately, in this case, the defense counsel was not familiar with the Manual for Courts-Martial. Their failure to know and understand the governing manual was deficient performance that cannot be excused. *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex.Crim.App.1982); *Meier v. State*, 337 N.W.2d 204, 206-07 (Iowa 1983); *State v. Hawthorne*, 431 N.W.2d 630 (Neb. 1988).

To a large extent, the lack of professional expertise, the improper preparation and the inadequate investigation are endemic to the military justice system. In order to exercise "due diligence" the attorney must be

competent to act diligently. This is often a flaw in the military justice system, since trial defense counsel are assigned in their first tour of duty and possess little if any criminal trial experience. A circumstance that needs to be examined is the experience and the ability of the young JAG trial defense counsel, who operating on his or her own, usually without an investigator, tries to prepare a defense. In judging whether due diligence has occurred, the Court must evaluate the defense team as to whether they were capable of exerting more diligence than they did. Here, the defense team does not have the training or the tools that they need to achieve greater diligence.

The problem seems to be a lack of experience in the Navy Legal Service Offices. Most defense counsel are in their first tour of duty. Satellite offices are spread across many locations. By the time the trial defense lawyers gain the level of experience necessary to defend complicated cases such as the instant case, they are ready to transfer. These particular trial defense counsels would have been more familiar with the law and the tactics of complicated trial had it arisen a year later in their tour. Both are very good attorneys whose only sin was to be inexperienced. Unfortunately, both have now left the Navy.

The problem is not with the quality of the attorney but with the level of support provided. It may be hard and perhaps impossible to compensate for lack of experience, although the assignment of a qualified investigator at each NLSO office would help to mitigate the problem. The accused should not have to suffer for institutional problems. While it may cause the military some discomfort to examine this problem, issues such as

this need to be examined so that our military system of justice can meet Constitutional and Congressional dictates of fundamental fairness and due process. The military system is in many respects fairer than the civilian system. That does not mean, however, that the system is perfect. While perfection may be impossible, its pursuit should be our goal. Here there are institutional problems that need to be addressed to insure that our military members receive effective assistance of counsel and fair trials. We are a nation at war and people are our most important asset. Petty Officers such as BM1 Lucas are in many ways the back bone of the Navy. We must ensure that we do not attrite them needlessly.

As a Boatswain's Mate, Petty Officer Lucas is an expert on many matters dealing with seamanship. He is not an expert on legal matters. He requires effective counsel well versed on legal tactics and procedures. Boatswain's Mates do not receive training in those matters. Absent effective counsel the average Boatswain's Mate would be as befuddled as the average Surface Warfare Officer would be in Space Shuttle maneuvers. That's why competent and experienced legal counsel are critical to ensuring that courts-martial are conducted fairly and effectively. In this case, competent, effective and experienced counsel was lacking. Consequently, under the standards of *Strickland*, *Wiggins* and *Rompilla*, the conviction must be set aside.

III The Military Judge Violated the Due Process Clause of the Fifth Amendment to the United States Constitution When He Refused to Allow the Court-martial to Call Witnessers Pursuant to M.R.E. 614.

This Court has held that the military courts are required to enforce the provisions of the MCM as promulgated by the President under Art. 36. *United States v. Scheffer*, 523 U.S. 303, (1998). Consequently, the actions of the Court of Appeals for the Armed Forces are not in keeping with the precedents of this Court. Additionally, the other Circuit Courts of Appeal have sanctioned witnesses called by the court pursuant to Federal Rule of Evidence (F.R.E.) 614. The Court of Appeals for the Armed Forces has abandoned that position by not requiring the enforcement of the similar rule which is contained in M.R.E. 614.

At one point in the trial the Military Judge was asked if the members would receive an opportunity to hear from another witness in light of the defense presentation. The Military Judge foreclosed this avenue without discussion or explanation. Such an action is a violation of M.R.E. 614. Even after the court members have begun their deliberations, they may seek additional evidence. *United States v. Parker*, 7 U.S.C.M.A. 182, 21 C.M.R. 308 (1956); *United States v. Turkali*, 6 U.S.C.M.A. 340, 20 C.M.R. 56 (1955). It was obvious that the court wanted clarification in light of the defense presentation. Failure to obtain that clarification may have negatively impacted the defense case. Consequently the court below should have set aside the convictions. Instead neither they nor the Court of Criminal Appeals even addressed the issue.

Art. 36 is the governing statute which authorizes the President to promulgate evidentiary rules. These rules, contained in the Manual for Courts-Martial, itself an Executive Order, have the force of law and are is subordinate only to the Constitution, treaties, and federal statutes. Frederic I. Lederer,[1] *The Military Rules of Evidence: Origins and Judicial Implementation*, MILITARY LAW REVIEW, 130 Mil. L. Rev. 5 (Fall 1990). Although originally opposed by the Navy, *Id.*, the Military Rules of Evidence were promulgated by the President, effective September 1, 1980. Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (1980). One of the stated purposes of the Military Rules of Evidence is to establish uniformity, as far as is practicable, with the Federal Rules of Evidence. Amendments to the Federal Rules of Evidence are automatically incorporated in Military Rules of Evidence eighteen months after the effective date of such amendments, unless action to the contrary is taken by the President. M.R.E. 1102. This is in consonance with the dictates of Art. 36 which require the military court-martial system to comply with the rules of evidence used in criminal proceedings under federal law.

Presidential authority to grant additional rights not found in the Constitution and the federal statutes has also been recognized in the military system. *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). This Court has noted Presidential authority to promulgate

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[1] Major Lederer was the Army representative on the Joint Service Committee that drafted the Military Rules of Evidence. Major Lederer also was the primary drafter of the initial analysis. Manual for Courts-Martial, Appendix 22 (2005).

rules for court-martial in *Scheffer, supra.* This court has also recognized that Executive Orders falling properly within the valid delegation of power by Congress have the force and effect of law. *Public Utilities Commission v. United States,* 355 U.S. 534; *Miller v. Arkansas,* 352 U.S. 187 (1956); *Billings v. Truesdell,* 321 U.S. 542 (1944).

Here the Military Judge ignored a rule of evidence, M.R.E. 614. He does not have the power to do so. Even in the military system, it is well settled that a Judge exceeds his authority if, by its very language, a rule of evidence cannot be applied to the limited issue presented to him to support his ruling. *United States v. Wade,* 15 M.J. 993, 997 (N.M.C.M.R. 1983). Federal Judges are required to apply the rules of evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 585-87 (1993). *See, also, Complaint of Nautilus Motor Tanker Co., Ltd.,* 85 F.3d 105, 111 -112 3rd Cir. 1996); *Park v. City of Chicago,* 297 F.3d 606, 611 (7th Cir.2002). This one did not. The Court of Criminal Appeals and the Court of Appeals for the Armed Forces abdicated their responsibilities by refusing to require that M.R.E. 614 be enforced.

In the military system, the court-martial members play a more interactive role than a civilian jury. M.R.E. 614 allows the members to ask questions and call witnesses. They adjudge the sentence, if any. Thus their ability to call and examine witnesses has long been enshrined in military justice. Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-martial Panel Members,* MILITARY LAW REVIEW, 176 Mil. L. Rev. 190 (n. 19) (June 2003). In that respect,

the members have the same powers as a federal judge under F.R.E. 614. The two rules are in consonance except for the uniquely military provision that grants the members the power to call and interrogate witnesses.

All other Circuits that have addressed the matter have concluded that the court has the power under F.R.E. 614 to call and interrogate witnesses. *United States v. Brandt*, 196 F.2d 653, 655. (2d Cir. 1952); *United States v. Karnes*, 531 F.2d 714 (4th Cir. 1976); *Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co.*, 143 F.2d 826 (5th Cir. 1944); *Fielding v. United States*, 164 F.2d 1022 (6th Cir. 1947); *Smith v. United States*,., 331 F.2d 265, 273. 8th Cir 1964); *Estrella-Ortega v. United States*, 423 F.2d 509 (8th ir, 1970); *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974) *cert denied*, 420 U.S. 911.

It is well established, however, that not every error in the exclusion of defense evidence constitutes constitutional error. See *United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir.1992); *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir.1988). If the petitioner can establish the exclusion of material or vital defense that evidence must usually be shown. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868-69 (1982); *United States v. Robaina*, 39 F.3d 858, 862 (8th Cir.1994).

In this particular case, the due diligence of the members was stifled by the Military Judge when he prevented them from calling them. It was obvious that the members wanted clarification in light of the defense presentation. The members wanted to call additional

witnesses concerning the possibility of a firearm accident. At least two members were Marines who would have had extensive firearms training. They knew the questions to ask. Failure to allow them to call witnesses no doubt negatively impacted the defense case. The Military Judge's refusal to allow them to do so was clear error. The refusal of the courts below to address this error was an improper abstention of their responsibilities.

Petitioner prays that this Court instruct the courts below to reconcile their position with the rulings of the other federal Circuit Courts of Appeal and to enforce the provisions of M.R.E. 614.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

Respectfully Submitted,

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(any footnotes trail end of each document)

United States Court of Appeals
for the Armed Forces
Washington, D. C. 20442-001

UNITED STATES,	)	
	)	
Appellee	)	Crim. App. Dkt. No. 2002-01157
	)	
	)	
v.	)	O R D E R
	)	
ERIC V. LUCAS	)	
	)	
Appellant	)	

On consideration of the petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is by the Court this 26th day of May, 2006,

ORDERED:

That said petition be, and the same is hereby denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (WELLS, Esq.)
Counsel; for Appellee (LEE)

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

ERIC V. LUCAS NMCCA No. 2002-01157

V.

United States
Respondents

Sentence Adjudged 14 Feb. 2002.
Decided 15 Sept. 2005.

Sentence adjudged 14 February 2002. Military Judge: T.K. Leak. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

John B. Wells, Civilian Appellate Defense Counsel.
Capt Rolando Sanchez, USMC, Appellate Defense Counsel.
Maj Wilbur Lee, USMC, Appellate Government Counsel.

Before PRICE, SCOVEL and MULROONEY, Appellate Military Judges.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

Pursuant to mixed pleas, the appellant stands convicted of aggravated assault (three specifications), wrongful discharge of a firearm endangering human

life, wrongful communication of a threat, and kidnapping (two specifications) [FN1]. The appellant's offenses violated Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 828 and 934. A general court-martial composed of officer and enlisted members sentenced the appellant to confinement for one year, total forfeiture of pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's 13 assignments of error [FN2], the petition for new trial, the Government's response, the appellant's reply, the appellant's supplemental brief, and the oral arguments. Of the 13 assignments of error, only two warrant relief: improvident guilty pleas and post-trial delay. However, we will also discuss the sufficiency of the evidence of Charge I, Specification 3, (aggravated assault) and the appellant's claim of ineffective assistance of counsel. As modified, we conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

After their ship returned to home port, the appellant and two shipmates went to his house to drink and socialize. The two shipmates were Seaman (SN) Makani Young and SN Larry Carpenter. After consuming an undetermined amount of alcohol, the appellant called his girlfriend on his cell phone. During that telephone conversation, they argued with each other. The appellant became angry and shot his cell phone with a Davis .380 semiautomatic pistol.

With the pistol in his hand, the appellant went into the living room. SN Young was sitting on the floor in the living room. SN Carpenter was also present in the room. The appellant was still angry and told SN Carpenter he would kill him. When SN Young told SN Carpenter not to worry and that the appellant would not shoot him, the appellant turned and shot SN Young in the leg. SN Carpenter jumped up and tried to run out of the house. The appellant pointed the gun at SN Carpenter and told him to sit down, which he did. SN Young then tried to raise himself up from the floor and the appellant shot him again in the leg. Both Sailors remained in place for fear that the appellant would shoot again.

A few minutes later, a car pulled up outside the house. Ms. Jaime Chong got out and went into the house to visit the appellant. Seeing an opportunity to escape, SN Young and SN Carpenter left the house and went outside. The appellant fired a fourth shot in the direction of SN Young but did not hit him. The two Sailors then drove away.

Ms. Chong asked the appellant if he wanted to go to a nearby casino. The appellant said yes, and followed Ms. Chong home so that she could drop off her baby. Realizing that he had forgotten his money, the appellant drove back to his house. Ms. Chong met him there, they decided not to go to the casino, and she stayed at the appellant's house that night. Despite his earlier consumption of alcohol, there was no indication in the record that the appellant had any difficulty driving his truck that evening.

Ineffective Assistance of Counsel

The appellant contends that his trial defense team was ineffective at trial. Specifically, he asserts that his attorneys failed to: (1) properly explain his right to civilian counsel; (2) investigate the characteristics of the pistol; (3) obtain a polygraph examination of the appellant; (4) prepare defense witnesses for cross-examination; (5) adequately litigate the defense of accident; (6) object to improper rebuttal argument; and (7) pressured the appellant to enter improvident guilty pleas. Having considered this assignment of error, we conclude that the appellant suffered no material prejudice to any substantial right.

In its recent decision of *United States v. Davis*, 60 M.J. 469 (C.A.A.F.2005), our superior court set forth a comprehensive explanation of the legal concept of ineffective assistance of counsel under the Sixth Amendment. To obtain relief for a complaint that he was deprived of the effective assistance of counsel, the appellant has the burden to show that his lawyer's performance fell below an objective standard of reasonableness. Counsel's performance is presumed to be competent and adequate; thus, the appellant's burden is especially heavy on this point. He must establish a factual foundation for his complaint of deficient performance. Second-guessing, sweeping generalizations, and hindsight will not suffice. *Davis*, 60 M.J. at 473.

To determine whether the presumption of competence is overcome, we follow a three-part test:

> 1. Are the appellant's allegations true and, if so, is there a reasonable explanation for the lawyer's actions?

> 2. If the allegations are true, did the level of advocacy fall measurably below the performance standards ordinarily expected of fallible lawyers?
> 3. If so, we test for prejudice by asking whether there is a reasonable probability that, but for the lawyer's error, there would have been a different result.

Id. at 474.

In his post-trial clemency submission and on appeal, the appellant complains that his trial defense team did not research and present important facts regarding the pistol that supported a defense of accident. Although not clearly explained by appellate defense counsel, we understand the complaint to refer to each of the shots except the first shot into the cell phone. He also asserts that the defense team pressured him to enter guilty pleas to aggravated assault under Charge I, Specification 2 when a defense of accident existed to that charge.

As to the latter assertion, the only evidence of the appellant's complaint is his affidavit belatedly filed on the eve of oral argument. Rebutting this complaint is the colloquy among the military judge, the appellant, and the defense team that supports a conclusion that the appellant, entered voluntary guilty pleas of his own choice. The record clearly shows that the appellant and his counsel agreed upon a trial strategy of pleading guilty to some of the charged misconduct and then arguing that the rest of the Government's charges were baseless. We will not question this common and generally accepted trial defense strategy, nor will we

credit the appellant's unsupported complaint of pressured guilty pleas. [FN3]

We now address the appellant's contention that the defense team failed to properly investigate and litigate the defense of accident. As part of a post-trial clemency submission, a report from a private investigator stated that this particular type of pistol has a safety mechanism that can be easily and unintentionally disengaged. Even if that is true, we find nothing in the record of trial that persuades us that the safety mechanism in the pistol in question was a factor in the appellant's misconduct.

We note that the appellant stated during the providence inquiry and testified on the merits that he did not intentionally fire the pistol. That does not necessarily mean that the safety mechanism failed. Indeed, during the providence inquiry, the appellant stated the safety *was in the off position* and that the gun just went off, as though he bumped the gun against his leg.

We also note that a defense expert witness, Chief Utilitiesman (UTC) Robert C. Barr, USN, testified that to fire this semiautomatic pistol, one has to pull the trigger distinctly for each shot. The appellant has presented no persuasive information to rebut that testimony from his own witness.

As to the complaint that the defense team failed to adequately litigate the defense of accident, we find no merit. To persuade the members that the appellant's shootings were accidental, defense counsel skillfully examined prosecution and defense witnesses, including

UTC Barr, then cogently argued that defense. This theory was competently litigated, and apparently discounted by the members at the court-martial. The appellant's complaint amounts to nothing more than post-trial second-guessing.

The remaining specific assertions of deficient performance do not warrant discussion. This assignment of error is without merit.

Petition for New Trial

The appellant petitions for a new trial under Article 73, UCMJ, based on a post-trial polygraph examination and the discovery of information regarding the characteristics of the pistol. We have already discussed the gist of the latter contention. To the extent that additional information about the pistol was developed after trial, we conclude that such information could have been discovered before trial. Moreover, we conclude that the information now proffered by the defense would probably not have produced a more favorable result.

RULE FOR COURTS-MARTIAL 1210(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

As to the polygraph examination, such evidence is inadmissible in trials by court-martial. Military Rule of Evidence 707, Manual for Courts-Martial, United States (2000 ed.); *see United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Accordingly, even if a purportedly favorable polygraph result was offered at trial, it would not be admitted and

published to the members, and thus, not produce a more favorable result. We specifically decline the appellant's invitation to ignore a black-letter rule and distinguish a plainly worded holding from the United States Supreme Court.

Providence of Guilty Pleas

The appellant contends that his guilty pleas to Charge I, Specification 2, aggravated assault upon SN Young (two gunshots) and Charge II, Specification 1, wrongful shooting of his cell phone, are improvident. We agree in part.

We will address the latter offense first. The elements of the offense of willful and wrongful discharge of a firearm under Article 134, UCMJ, are as follows:

> (1) That the accused discharged a firearm;
> (2) That such discharge was willful and wrongful;
> (3) That this discharge was under circumstances such as to endanger human life; and
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 81b. " 'Under circumstances such as to endanger human life' refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of

the weapon, the act was unsafe to human life in general." MCM, Part IV, ¶ 81c.

The appellant fired his pistol into his cell phone while he was standing in the kitchen of his home. At the time, SN Young was in the adjacent living room. As the appellant admitted during the providence inquiry, the shot could have ricocheted into the living room and hit SN Young. Under these facts, we conclude that there is no substantial basis to question the providence of this guilty plea. *United States v. Prater*, 32 M.J. 433 (C.M.A.1991).

Turning to the appellant's guilty pleas of aggravated assault, we reach a different conclusion. The military judge began the providence inquiry by reciting the elements of the offense, then asked the appellant if he understood. The appellant responded, "Yes sir. Unintentionally." Record at 79. As immediately noted by the trial counsel, the appellant thereby put the military judge on notice that he would probably have to resolve the defense of accident. After much discussion among the military judge and counsel about the theory of assault, i.e., attempt, offer, or culpable negligence, the military judge took a recess, held an R.C.M. 802 conference, then started over in his colloquy with the appellant. When asked to describe his actions, the appellant said he unintentionally shot SN Young. The gun was in his hand and it "went off twice." *Id.* at 85. After the military judge explained the concept of culpable negligence, he asked the appellant if he admitted that the shootings were culpably negligent. The appellant responded, "No, sir." *Id.* at 88. At that point, the military judge told the appellant he could not accept his guilty plea to this offense and put the court

in recess.

After the recess, the military judge told the appellant that his defense counsel indicated that he thought the plea might be provident. Apparently having reconsidered his decision to reject the plea, the military judge commenced the colloquy anew. The appellant explained that he was swinging the pistol as he walked through the house, but didn't know it was loaded until it went off, apparently referring to the first shot into SN Young's leg. Although once again insisting that the shots were unintentional, the appellant admitted that he was culpably negligent.

At this point, the trial counsel requested that the military judge ask the appellant whether his finger was on the trigger as he was swinging the pistol because "he may think there was some sort of accident." *Id.* at 95. When asked, the appellant said he didn't know, that the safety was off and "it just went off." *Id.* at 96. The appellant elaborated by saying automatic weapons go off, perhaps by bumping it against his leg while he was walking. In response, the trial counsel voiced concern that the facts did not support a theory of culpable negligence. However, the military judge chose to shift his attention to the other specification. After concluding that portion of the providence inquiry, the military judge cited the case of *United States v. Redding* and accepted the appellant's guilty pleas to aggravated assault under Charge I, Specification 2.

Although the military judge did not specify which *Redding* case he relied on, based on our research, we are convinced he referred to *United States v. Redding*, 34 C.M.R. 22, 1963 WL 4752 (C.M.A.1963). In

that decision, our superior court held that aggravated assault may be grounded upon culpably negligent conduct "even though the assailant did not intend the ultimate consequences of his action." *Id.* at 24. The court also held that accident is a defense to aggravated assault by culpable negligence. Accident is defined as the "unintentional and unexpected result of doing a lawful act in a lawful manner." R.C.M. 916(f). Moreover, this defense is not available when the act which caused the injury was a negligent act. R.C.M. 916(f), Discussion.

When a defense is raised by the appellant's statements during a providence inquiry, the military judge should explain the elements of the defense to the appellant and resolve the issue, before accepting the guilty plea. R.C.M. 910(e), Discussion; *see United States v. Lee*, 16 M.J. 278, 281 (C.M.A.1983); *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A.1976). In this case, the defense of accident was raised by the appellant's statements and frequently expressed concerns of the trial counsel. [FN4] However, the military judge failed to squarely address the issue by advising the appellant of the elements of the defense and engaging in an appropriate colloquy with the appellant to resolve the issue. The military judge's reliance on the *Redding* case is not helpful because that was a *contested case.* Moreover, that misguided reliance is troubling because it suggests that the military judge did not understand his responsibility to resolve potential defenses *in guilty plea cases.*

Appendix 12

In addition, the military judge failed to reopen the providence inquiry after testimony on the merits

raised the defense of accident anew. As stated previously, the appellant testified that he did not intentionally fire the pistol. At this point, the military judge was duty-bound to excuse the members, call an Article 39a, UCMJ, session and reopen the providence inquiry. Art. 45(a), UCMJ; *United States v. Palus*, 13 M.J. 179, 180 (C.M.A.1982); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A.1980). We conclude that there is a substantial basis to question this guilty plea and therefore must set aside the finding of guilty.

Sufficiency of Evidence

The appellant asserts that the evidence is legally and factually insufficient to support the finding of guilty of Charge I, Specification 3. Specifically, he contends that the testimony of Ms. Chong establishes that the appellant never fired the fourth shot toward SN Young. In the alternative, the appellant argues that, assuming a fourth shot was fired, the military judge failed to instruct the members on the defense of accident. We decline to grant relief.

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A.1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable

doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R.1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R.1984)). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A.1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F.2002).

We have carefully considered the relevant evidence. On the one hand, we have the testimony of SN Young and SN Carpenter that a shot was fired in the direction of SN Young as the two ran from the appellant's house. In fact, SN Young testified that he heard the bullet go past his head. Corroborating evidence includes a shell casing found near the location the appellant was standing when the shot was fired. On the other hand, we have the testimony of the appellant and Ms. Chong that no shot was fired. We have also examined other evidence bearing on the relative credibility of these four witnesses. We find that the appellant did fire a shot in the direction of SN Young.

However, there are two other issues that warrant further discussion. First, as noted previously, the appellant argues that even if a shot was fired, it was merely an accident. Second, we note that the only theory of assault presented to the members was that of

attempt. Theories of offer or culpable negligence were not presented to the members. We will examine whether the necessary specific intent to harm SN Young existed in the context of an assault by attempt.

We conclude that the appellant was able to, and actually formed, the specific intent to harm SN Young by firing his pistol in the direction of the victim. Despite the evidence of the appellant's intoxicated and erratic behavior that evening, we note that he drove his truck after the shooting without apparent difficulty. If he was able to drive a motor vehicle some distance to Ms. Chong's house and then drive back to his house without accident, we are confident that he was able to point his pistol toward SN Young with the requisite specific intent to harm SN Young and pull the trigger.

The potential defense of accident is more problematic. Based on the testimony of the UTC Barr and the appellant, we have no doubt that the defense of accident was raised by the evidence. For some reason, neither side requested an instruction on the issue. In fact, the defense was never mentioned during the discussion of instructions. Nevertheless, once raised, the military judge had a duty to instruct *sua sponte*. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F.2002). We must now decide whether it appears " 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Had the military judge given the standard accident instruction, he would have charged the members that "if the accused was doing a lawful act in a

lawful manner free of any negligence on his part, and unexpected bodily harm occurs, the accused is not criminally liable." Military Judge's Benchbook, Dept. of the Army Pamphlet 27-9 at 5-4 (Ch-1, 30 Jan 1998). In this case, we conclude that the members found beyond a reasonable doubt that the appellant fired his pistol toward SN Young. The fact that he did so completely vitiates the potential defense, for under the facts and circumstances, such an act was not lawful and not free of negligence. Thus, we are confident beyond a reasonable doubt that the error did not contribute to the verdict.

Post-Trial Delay

The appellant complains that he has been prejudiced because of post-trial delay in the review and processing of the record of trial. He asks that we set aside the reduction in rate, adjudged forfeitures of pay and allowances, and the bad-conduct discharge. We find merit in this assignment of error.

To assist in our analysis of this assignment of error, we provide the following chronology of the review of the appellant's 603-page record of trial:

14 Feb 2002 Sentence adjudged
16 Jul 2002 Trial Counsel examines record
19 Sep 2002 Record authenticated by trial counsel
15 Oct 2002 Staff Judge Advocate's Recommendation signed
10 Nov 2002 Clemency petition submitted
27 Nov 2002 Convening Authority's Action signed
17 Jun 2003 Record docketed

We consider four factors in determining if post-

trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F.2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F.2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may " 'give rise to a strong presumption of evidentiary prejudice.' " *Id.*, 61 M.J. at 83 (quoting *Toohey*, 60 M.J. at 102).

Here, there was delay of about six months from the date of the convening authority's (CA's) action until the record was docketed. The Government does not dispute the appellant's allegation that the record was received at the Navy-Marine Corps Appellate Reiew Activity as early as December 2002, but was not docketed until June 2003. Based on our review of the record and the parties' briefs, we will assume *arguendo* that the appellant's allegation is correct. We find that the cumulative delay alone, particularly the segment from convening authority's action until docketing, is facially unreasonable, triggering a due process review. *See United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F.2005)(decision of Court of Criminal Appeals (CCA) as to sentence reversed for review of the 511-day delay in shipping record of trial from convening authority to CCA); *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A.1990)(delay in forwarding a record of trial to the Court of Criminal Appeals is "the least defensible of all" post-trial delays). Since there are no explanations in

the record, we look to the third and fourth factors.

We find no formal written assertion of the right to a timely appeal in the record. However, once the CA took his action in late November, the appellant repeatedly inquired concerning the whereabouts and status of the record. This is of particular importance given the length of time taken to move this record from the CA's office to this court.

We also have a claim of prejudice, although the appellant has not provided supporting evidence for the claim in his affidavit that he has been hindered in finding permanent employment because he has not obtained a DD 214 documenting his separation from the service. However, we are aware that many employers are understandably reluctant to hire service members who have not been discharged from active duty. We also note that, in his request for clemency, the appellant describes his difficulty supporting his family pending final action in this case.

Thus, we conclude that there has been a due process violation due to the post-trial delay. Under the facts of this case, we hold that the appellant is entitled to relief. We will consider appropriate relief in our reassessment of the sentence.

Conclusion

We have considered the remaining assignments of error and find them without merit. The findings of guilty of Charge I, Specification 2 are set aside. In the interest of judicial economy, that Specification is dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F.1998). Upon reassessment, we affirm only so much of the sentence extending to confinement for eight months and reduction to pay grade E-1.

Judge SCOVEL and Judge MULROONEY concur.

Footnotes

FN1. The appellant pleaded guilty to aggravated assault under Charge I, Specification 2, on Seaman (SN) Makani Young by shooting him twice in the leg, and to the wrongful discharge of a firearm, under Charge II, Specification 1. All other pleas were not guilty.

FN2. I. THE CONVENING AUTHORITY AND THE MILITARY JUDGE ERRED IN ALLOWING THE COURT-MARTIAL TO PROCEED IN THE NORTHERN DISTRICT OF FLORIDA.
II. THE APPELLANT SHOULD BE GRANTED A NEW TRIAL BASED ON THE DISCOVERY OF NEW EVIDENCE.
III. THE APPELLANT SHOULD BE GRANTED A NEW TRIAL BASED ON AN INCOMPLETE RECORD.
IV. THE TRIAL COUNSEL VIOLATED R.C.M. 919.
V. THE GUILTY PLEA TO CHARGE I, SPECIFICATION 2 WAS IMPROVIDENT.
VI. THE GUILTY PLEA TO CHARGE II SPECIFICATION 1 WAS IMPROVIDENT.
VII. THE CONVICTION FOR ASSAULT ON SN YOUNG (CHARGE I SPECIFICATION 3) WAS NOT LEGALLY OR FACTUALLY CORRECT. VIII. CHARGE I SPECIFICATION 1 IS

MULTIPLICIOUS WITH CHARGE II, SPECIFICATIONS 3 AND 4.

IX. THE MILITARY JUDGE ERRED IN NOT ALLOWING THE MEMBERS TO RECALL A WITNESS PURSUANT TO M.R.E. 614.

X. THE DEFENSE COUNSEL ARGUED FOR A PUNITIVE DISCHARGE WITHOUT THE CONSENT OF THE ACCUSED.

XI. THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

XII. THE CONVENING AUTHORITY ERRED IN NOT GRANTING CLEMENCY OR IN THE ALTERNATIVE THE JUDGMENT OF A BAD-CONDUCT DISCHARGE WAS TOO SEVERE.

XIII. THE TIME BETWEEN TRIAL AND LODGING THE APPEAL IN THIS COURT WAS EXCESSIVE.

FN3. Although related to this assertion of ineffective assistance, we will address the appellant's meritorious contention of improvident guilty pleas in a later section of this opinion.

FN4. In addition, the appellant's testimony on the merits repeated his claim that the shots were unintended and/or accidental.

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U. S. Constitution, Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just
compensation.

U. S. Constitution, Amendment VI. Jury trials for crimes, and procedural rights.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

10 U.S.C. § 836, Article 36 U.C.M.J. President may prescribe rules.

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

Military Rule of Evidence (M.R.E.) 614 Calling and interrogation of witnesses by the court-martial.

(a) Calling by the court-martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members wish to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

(b) Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form

acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) Objections. Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time or at the next available opportunity when the members are not present.

Military Rule of Evidence (M.R.E.) 707 Polygraph Examinations.

(a) Notwithstand ing any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

Military Rule of Evidence (M.R.E.) 1102. Amendments.

(a) Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.

(b) Rules Determined Not To Apply. The President has determined that the following Federal Rules of Evidence do not apply to the Military Rules of Evidence: Rules 301, 302, 415, and 902(12).

Rule for Court-Martial (R.C.M.) 910. Pleas.

(a) Alternatives.

(1) In general. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

(2) Conditional pleas. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) Refusal to plead; irregular plea. If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) Advice to accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) In a general or special court-martial, if the

accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under > R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military

judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) Plea agreement inquiry.

(1) In general. A plea agreement may not be accepted if it does not comply with > R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

(g) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

(h) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

(i) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M.

1305.

(j) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule for Court-Martial (R.C.M.) 913. Presentation of the case on the merits

(a) Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered.

(b) Opening statements. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

(c) Presentation of evidence. Each party shall have full opportunity to present evidence.

(1) Order of presentation. Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in

surrebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members.

(2) Taking testimony. The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

(3) Views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

(5) Reopening case. The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

Rule for Court-Martial (R.C.M.) 919. Argument by counsel on findings.

(a) In general. After the closing of evidence,

trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) Contents. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

(c) Waiver of objection to improper argument. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.